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1	UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK
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3	DAMIAN Y. KOLODIY,
4	Plaintiff,
5	v. 17 CV 830 (VEC)
6	EBGENY AFINEEVSKY, and PRAY FOR UKRAINE PRODUCTION LLC,
7	Conference Defendants.
8	x
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10	New York, N.Y. October 27, 2017 10:00 a.m.
11	Before:
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13	HON. VALERIE E. CAPRONI
14	District Judge
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18	APPEARANCES
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20	SHEARMAN & STERLING LLP Attorneys for Plaintiff
21	BY: MATTHEW BERKOWITZ JOSEPH PURCELL
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23	ASHCROFT LAW FRIM LLC Attorneys for Defendants
24	BY: MICHAEL J. SULLIVAN
25	ALEXEY TARASOV Attorney for Defendants

(Case called)

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THE COURT: I have before me a motion to dismiss by plaintiff of the defendants' counterclaims for defamation. I have read your papers. I have considered your arguments. Your motion is denied.

The plaintiff has repeatedly accused the defendant of being a liar. The defendant's business is being a documentarian. That goes to his business. Whether he is ever going to be able to prove any of this is a different story, but I'm going to let it proceed. So your motion is dismiss is denied.

That brings us to discovery, which is why I invited you all here this morning. I had previously extended your discovery deadline to November 15th. I currently have a request from the plaintiff to extend it again.

Let me say to everyone I do not like letters like your October 18 letter. I want lawyers to work together cooperatively, collegially, and professionally. My individual rules say don't write me about discovery disputes, get on the phone together and call.

To the extent you feel that you have to write me a letter, and I understand that sometimes lawyers just feel compelled to write a letter, please do not engage in sniping at each other. Specifically, Mr. Berkowitz -- I think you are the signatory on this letter -- you say, and I quote:

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"On September 25th (regrettably more than two weeks late) the parties submitted a joint letter noting that 'As of the date of this letter, defendants have not indicated to plaintiff whether they intend to use some or all of the 18 third-party witnesses.'

"Defendants represented in that letter that they will respond within two weeks from the date of this letter to plaintiffs' counsel. Defendants failed to comply with their own self-granted extensions. Defendants did not actually notify plaintiff about their intentions until October 17th, and then only confirmed that we intend to use all of the witnesses identified to date at trial."

You could have just said they didn't do what they said they were going to do. So please stop this. I understand that the two gentlemen at the end are at each other's throats. But the people with "Esq." at the end of their names should not be.

All of that said, Mr. Berkowitz, I share your frustration at the pace of discovery.

That said, Mr. Sullivan and his team are new to the case. I'm glad your client is here. I'm going to give Mr. Sullivan and his team the benefit of the doubt on discovery. If you change attorneys one more time, any deadline I have set is going to remain. If that means you are left without discovery, too bad, so sad. If it means I preclude evidence because they haven't had an opportunity to take discovery on

it, so be it. I'm not telling you have to keep Mr. Sullivan.

But if you change counsel again, those are the rules of the

road. Understood?

MR. AFINEEVSKY: Yes, your Honor.

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THE COURT: There are four issues, as I count them, in Mr. Berkowitz's most recent letter. Here are the issues that I understand. First, there is the issue of document production from the defendants: specifically, whether the defendants will have substantially completed or entirely completed discovery by October 30th.

The second issue is the defendants' responses to the plaintiff's interrogatories. The third issue is the location of depositions for the 18 nonparty witnesses. The fourth, which sort of is a subcategory of the third, is the issue of contact information for the Ukrainian witnesses, whether the defense counsel will accept service of process and whether the ambassador will waive diplomatic immunity. Overarching all of that is whether there will be an extension of discovery.

Do I have all of your issues, Mr. Berkowitz?

MR. BERKOWITZ: There is one more discovery issue on the document requests that is still outstanding, and that has to do with our request for revenue information with respect to the defendants' various movies. This came up on the call with your Honor on September 22nd, and you had said to call back if we could not reach resolution. That hasn't been resolved.

1 THE COURT: We'll come back to that.

Start with the first issue, which is document production. Mr. Sullivan, why can you not complete all of your document production based on the requests for production that have been outstanding now for months by October 30th?

MR. SULLIVAN: Your Honor, first, we had an agreement with the plaintiff that substantial completion would be done by October 30th. In fact, substantial completion is done. We indicated to the plaintiff, and we did this, your Honor, prior to the letter -- this is by way of email -- with the plaintiff agreeing to substantial completion by October 30th and that document production was to be completed probably by the first week in November. In fact, our document production will be done by November 3rd. So we have substantially completed.

For purposes of background, your Honor, we received the hard drives as we reported to the Court on the call. There were over 86,000 documents, about a quarter of a million pages. We have 58 search terms both in English and Russian that we had to use that produced over 21,700 hits.

We have reviewed about 70 percent of those and produced the other documents that were responsive to the document production request to Mr. Berkowitz on a rolling basis. The document production will be completed by Friday of next week. So we believe that we are substantially completed. We thought we had an agreement of October 30th for substantial

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plaintiffs' substantive interrogatories, which they objected to early in the case under local rule 33.3."

MR. BERKOWITZ: Your Honor, if I may, this was about the idea that we didn't have enough information, all facts, documents, or interrogatories responses to take depositions.

It is not something that we had hashed out specifically on the discovery call, in Mr. Sullivan's defense now.

THE COURT: Any reason you cannot respond to those interrogatories by November 13th?

MR. SULLIVAN: There is not, your Honor.

THE COURT: You will respond to all interrogatories outstanding, assuming there are not other objections beyond the local rule. Your deadline is November 13th. To the extent those interrogatories generate any follow-on document requests, your document requests must be served by November 20th. The production of any follow-on documents will be due December 15th.

That brings us to the issue of where you are going to take the depositions of the 18 Ukrainians. Mr. Sullivan.

MR. SULLIVAN: Ukraine, your Honor. Mr. Berkowitz is asking the defendant defending Mr. Berkowitz's clients claim to pay for the cost of transporting the witnesses to the United States in advance of the trial for purposes of deposition. I think that is completely unreasonable. There are a number of ways that the depositions could be taken, including video. If

MR. BERKOWITZ: According to information that I have from the Ukrainian government -- I have some website printouts of it -- I have to submit questions in advance. I can't just notice topics. I can't take document discovery. These are all

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limitations on what would be normal U.S. discovery procedures.

We don't actually think they are going to call 18 witnesses,

most of whom are noticed on the same topic. The burden has

been put on us to take non-U.S. style discovery on all of these

witnesses without really any belief that they are going to call

all of these people.

THE COURT: What is my authority to order them into some other location? Or why can't you do it by video?

MR. BERKOWITZ: I still couldn't get the documents in advance. I still couldn't subpoena them for documents. I still have to write out the questions in advance.

THE COURT: How can I overcome the Ukrainian blocking statute that doesn't allow you to subpoena documents?

MR. BERKOWITZ: It is a matter of they are precluded from testifying unless they submit themselves to the jurisdiction of this court or go to a neutral site like your Honor said. We would do the same with our witnesses who are from the Ukraine.

THE COURT: The defendant doesn't control these witnesses in that sense, do they? I understand that, and that would be perfectly reasonable if these were parties.

MR. BERKOWITZ: Understood, your Honor. But just the same, like they might want to come for a trial date wherever they might be set, they could come as if the trial was during discovery and come for a deposition just the same as they might

1 come for trial.

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If those witnesses are not available the second time, the federal rules provide for entry of that deposition testimony. It still just has to be one trip, and it is just a matter of when your Honor orders that to be, just like they would have to come for a particular trial date if your Honor order a particular trial date.

MR. SULLIVAN: Your Honor, we don't have any control over the witnesses and whether or not the witnesses would be available to travel to a neutral third country. Mr. Berkowitz's request is for the defendant to pay for the cost of these witnesses coming in for his deposition.

THE COURT: I don't think he cares who pays for it as long as he is not paying for it.

MR. SULLIVAN: That's true. I suspect the witnesses aren't going to come here on their own penny.

MR. BERKOWITZ: Your Honor, somebody has to pay for one trip for them. If that one trip is to be paid for, it should be during the deposition period. That's our view. It's the same cost. If they don't want to pay for a second trip, then Mr. Sullivan can enter their deposition testimony.

THE COURT: Anything more that you want to tell me on that?

MR. SULLIVAN: You have the Hague Convention as well, your Honor. We could use another source for the purpose of

getting evidence from these witnesses.

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THE COURT: Based on the Ukrainian statute, it sounds like that is going to be limited to written interrogatories.

MR. SULLIVAN: Your Honor, he hasn't exhausted the means for purposes of taking a deposition. It seems to me it is not even ripe before the Court. He hasn't taken any steps at all to see whether or not they would succumb to a deposition other than what might be within the rules of the Ukraine.

THE COURT: Have you given him contact information yet?

MR. SULLIVAN: We have not given him the addresses. We can provide the addresses. We understand the plaintiff is familiar with a number of the witnesses who are on the witness list.

THE COURT: That is issue number 4, which is contact information, whether you will accept service of process and whether the ambassador is willing to waive diplomatic immunity.

MR. SULLIVAN: I have no authority to represent the ambassador in terms of whether or not there will be any waiver.

THE COURT: I'm not asking you whether you represent Is he willing to waive diplomatic immunity? Are you in contact with him?

MR. SULLIVAN: I don't know. I am not, your Honor. don't know whether Mr. Berkowitz has asked the ambassador. He is the one who wants to depose the witness. They should take

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contacting. Do you know some of these witnesses, some of the 18, the small army of witnesses, or does your client?

MR. BERKOWITZ: It is a minority of them, but yes.

THE COURT: Have you contacted any of them?

MR. BERKOWITZ: We have talked to two, yes.

THE COURT: Are they willing to go to a neutral country to be deposed?

MR. BERKOWITZ: There is one of them that I think,

1 pending a visa, would come here.

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THE COURT: So you have some. I'm not sure what I'm going to do about this. You both have some reasonable arguments. I want to see briefs on exactly what my authority is to say that the defendant should bring him to the country now, he will be deposed on video; alternatively, they are not going to be permitted to testify at trial. Similarly, what, if anything, I have the power to do relative to the ambassador witness. I would think that the answer is either he waives — is he here in the country now?

MR. BERKOWITZ: I believe he is in Washington, D.C.

THE COURT: That is part of the country.

MR. BERKOWITZ: Yes.

THE COURT: He either has to waive so that he can be deposed or he's going to be precluded from testifying. The question is whether I have the authority to enter that order. That seems reasonable to me, that he can't not make discovery and then show up as a witness.

MR. BERKOWITZ: Would you like us to file the opening brief on that?

THE COURT: Yes. I'll get back to you on the timing of that.

That brings us to the revenue issue, which is the open issue. Refresh my recollection what the issue is.

MR. BERKOWITZ: Your Honor, we could get this

information in a number of different ways. What we want to show effectively is a trend line for the defendants' career revenue. We believe, we don't know this for sure, but we believe there is a big spike where the infringement and alleged false advertising occurs. It is a causation issue. It is purely evidence, further evidence, of causation that the infringement and the false advertising led to revenue in the defendant.

THE COURT: Why is that relevant to damages? The issue is what happened to your client. He's the plaintiff.

MR. BERKOWITZ: There are two points to that, your Honor. One is we do think that there were two films, two kind of competing films, and if it wasn't defendant, it may very well have been plaintiff. Also, the Lanham Act provides for disgorgement of profits. So we have a false advertising claim, and we think it is relevant that defendant made profit.

Whether it is final proof or not is a different issue, but we think it is relevant that he made significant profit vis-a-vis his prior movies and that there is a correlation between the false advertising there.

MR. SULLIVAN: We just think it is not relevant, what he has made in terms of gross profit on any of the other films, except for the film in question.

THE COURT: How many other films did he make prior to this one?

MR. BERKOWITZ: Your Honor, I do think the others are relevant. We could take the information in a number of different ways. It could be an interrogatory. It could just be an answer of how much revenue he received for the various

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films. We want to be able to show a trend line. Whether a documentary is in such a different category as another kind of film, I'm not sure.

THE COURT: If his documentary on the Ukrainian revolution made a lot more money than a feature film, that might be interesting.

MR. BERKOWITZ: We are willing to take this information a number of different ways, but we don't want to not have it. We think it is a relevant data point to show causation.

MR. SULLIVAN: Your Honor, we just don't see the relevance at all with regards to the profit made on any other films.

THE COURT: I think this is sufficiently close that I am going to let you brief that as well. On this one I'm going to have the defendant start. You are essentially requesting that the plaintiffs' request for this information be quashed. How long do you like for that, Mr. Sullivan?

MR. SULLIVAN: Three weeks, your Honor.

THE COURT: Three weeks from today?

MR. SULLIVAN: Yes.

THE COURT: That would be November 17th. Let me back up. Let me give you two weeks for this, so 11/10. I am going to give you until November 10th as well for the brief on what is my authority relative to where the depositions take place

and the waiver of immunity for the ambassador. You are going to cross. I will give you each two weeks to respond, a little under two weeks to respond, so that it is not due the day after Thanksgiving. Make it the day before. November 22nd your responses are due. No replies.

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One further thing. In your letter you said you are perfectly happy with the existing discovery deadline, that you don't need any more time for discovery, right?

MR. SULLIVAN: We said if in fact no additional discovery time was being afforded for the plaintiff. All we said to the plaintiff, your Honor, is whatever the discovery schedule should be, it should be for both parties. We thought we had an agreement with regards to that.

THE COURT: Stop. I already told you I don't want to hear that. I'm not going to respond on one side. I hear you and I've made it clear to the defendant that we are not changing counsel again, or if we do, the discovery deadlines are going to stand.

Because we are going to need some time to think about the issue of where the depositions take place and then you are going to need some time to actually take the depositions -- have the parties been deposed yet?

MR. BERKOWITZ: Not yet.

THE COURT: Do you have dates for that? Are you trying to postpone them until the very end? What's the story?

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MR. BERKOWITZ: From the plaintiffs' side, we just received the notice for Mr. Kolodiy's deposition. We have not noticed it for the defendant. We are waiting for the documents.

January 26th to get all of your depositions done. To the extent those depositions give rise during the deposition or when you think about it afterwards to follow up requests for documents, those follow-up requests must be made not later than February 2nd. Responses to those requests for follow-on documents must be produced by February 16th. We'll have a status conference on February 23rd, at which point you will all tell me that your fact discovery is complete.

MR. BERKOWITZ: Does that June 26th deadline include the Ukrainian witnesses?

THE COURT: Yes. That's why I pushed it a little further than I had planned. We will have it briefed. That gives you two months from the time you finish briefing it to try to turn around and answer for you really quickly. That gives you two months to take those depositions. No matter where they are going to be, that ought to give you enough time to do it.

MR. BERKOWITZ: I think, your Honor, it says two to three months to do it via the Hague.

THE COURT: If we have to go by the Hague and that is

the only solution, I will adjust the schedule accordingly.

Surely there is going to be a better solution than the Hagu

Surely there is going to be a better solution than the Hague Convention.

That brings us to expert discovery. Is there a plan to take expert discovery?

MR. BERKOWITZ: We will likely have one or more expert witness, your Honor. We don't have a set plan in terms of report deadlines agreed upon, and I don't think it has been discussed at this point.

THE COURT: Is the defendant going to need expert discovery?

MR. SULLIVAN: Yes.

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THE COURT: The parties need to meet and confer.

Given what you have now have as your fact discovery deadline,
what is your expert discovery deadline. While I am loath to do
this, you are going to have to agree on interim deadlines: who
produces reports when, who produces responsive reports when,
when depositions will occur. I want that all to be so ordered.
I don't want to see you guys again on discovery issues and I
don't want to hear from you again on discovery issues.

If you really can't work it out, that's fine, that's what I'm here for. But you are all good lawyers. There is no reason why you can't work out these problems.

Anything further, Mr. Berkowitz?

MR. BERKOWITZ: No, your Honor, not from us.